UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/650
20 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 650

Case No. 703: BAKR ET AL

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 17 June 1992, Daoud Nehar Bakr, Mohammad Nayef Abbas, Eilan Mahmoud Mi'ari, Khaled Ahmad Yasin, Hassan Abdulla Al Sha'bi and Mahmoud Mohammed Said Tamim, former staff members of the United Nations Relief and Works Agency for Palestine Refugees, hereinafter referred to as UNRWA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 10 October 1992, the Applicants, after making the necessary corrections, again filed an application requesting the Tribunal to order, inter alia:

"(a) [The production of certain documents].

...

(b) Rescinding the Respondent's decisions not to reinstate Applicants, or to compensate them for their services (...).

(c) Reinstating the Applicants to service, and considering them on special leave with pay since they applied for reinstatement i.e. 1.9.1988, and repayment of their Provident Fund benefits under the UN operational rate available at the time.

(d) Compensating the Applicants for the injury, hardship, and loss sustained with the following:

BAKR : US$ 55,000,	ABBAS : US$ 45,000
MI'ARI : US$ 45,000,	YASIN : US$ 50,000
SHA'BI : US$ 45,000,	TAMIM : US$ 40,000"

Whereas the Respondent filed his answer on 29 March 1993;

Whereas the Applicants filed written observations on 25 April 1993;

Whereas, on 9 March 1994, the President of the Tribunal requested the Respondent to produce an answer on the merits, which he did on 20 April 1994;

Whereas, on 9 and 16 May 1994, the Applicant submitted additional statements;

Whereas the facts in the case are as follows:

The Applicant Daoud Nehar Bakr entered the service of UNRWA on 9 February 1955, as a Primary School Teacher, at the Kastal Boys School, in Homs Town, Syrian Arab Republic, on a contract of "indefinite duration" as an area staff member. He served thereafter until 30 September 1986, when he resigned from the Agency with effect from 1 November 1986. The Applicant was then paid the termination benefits to which he was entitled, including his Provident Fund benefits.

Mohammad Nayef Abbas entered the service of UNRWA on 1 April 1965, on a temporary indefinite appointment at the grade 6, step 1 level, as an area staff member, as an Elementary School Teacher at the Shajara School, North Area Homs, Syrian Arab Republic. He served thereafter, always as a Teacher, until 7 February 1987, when he resigned from the Agency, having reached the position of Senior

Teacher. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

Eilan Mahmoud Mi'ari entered the service of UNRWA on 16 October 1963, on a temporary indefinite appointment at the grade 5, step 1 level, as an area staff member, as a Teacher at the Beisan School, Hama, North Area, Homs, Syrian Arab Republic. She served thereafter until 17 February 1987, when she resigned from the Agency, having reached the position of Teacher B. The Applicant was then paid the separation benefits to which she was entitled, including her Provident Fund benefits.

Khalad Ahmad Yasin entered the service of UNRWA on 21 October 1959, on a temporary indefinite appointment, at the grade 5, step 1 level, as an area staff member, as a Teacher V at the Samkh Boys School, Hama, Syrian Arab Republic. He served thereafter until 15 February 1987, when he resigned from the Agency, with the functional title of Teacher C. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

Hassan Abdulla Al Sha'bi entered the service of UNRWA on 3 October 1964, on a temporary indefinite appointment at the grade 6, step 1 level, as an area staff member, as a Teacher D at the Khariyeh School in Lattakia, North Area, Syrian Arab Republic. He served thereafter until 7 February 1987, when he resigned from the Agency, with the functional title of Teacher A. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

Mahmoud Mohammed Said Tamim entered the service of UNRWA on 19 October 1966, on a temporary indefinite appointment at the grade 6, step 1 level, as an area staff member, as a Certified Preparatory Teacher at the Al Jora Boys School at Sanaber, South Area, Syrian Arab Republic. He served thereafter until 7 February

1987, when he resigned from the Agency, with the functional title of Senior Teacher. The Applicant was then paid the separation benefits to which he was entitled, including his Provident Fund benefits.

On 19 September 1988, the Applicants Abbas, Yasin, Sha'bi and Tamim wrote to the Field Director in the Syrian Arab Republic, claiming the right to be re-employed as teachers with priority over other candidates. In a reply dated 11 October 1988, the Acting Field Administration Officer advised the Applicants that the Agency's rules governing re-employment had changed in 1985 and that the new Agency policy was to recruit the best qualified teachers.

On 29 May 1989, the Applicant Mi'ari wrote to the Field Administration in the Syrian Arab Republic, enquiring about the possibilities of employment with the Agency. In a reply dated 1 June 1989, the Officer-in-Charge at the Syria Field Office informed the Applicant that her request for re-employment could not be entertained in light of rules relating to qualifications and age because she was more than 35 years old.

In October 1989, the Applicants wrote to the Field director in the Syrian Arab Republic, asserting their rights to be re-employed as teachers with priority over other candidates. In a reply dated 1 November 1989, the Field Office Director informed the Applicants as follows:

> "Judging by your above referenced letter, it is quite clear and unquestionable that you are well informed of the content of paragraph 3.6 of Personnel Directive A/4 part VI which you implicitly refer to in your letter and which was valid till October 1985, when it was cancelled.
>
> This prior knowledge of the provisions of the said Personnel Directive, together with the fact that rules and regulations in the Agency as in any other establishment or organization are in no way unamendable or not liable to change, which you must undoubtedly have realized through your long service with this Agency, should logically have urged you to raise an earnest question as to whether or not the

said provision was still valid before you tendered your resignations; particularly so, because you had pinned your hopes for re-employment with the Agency on that provision."

On 5 August 1991, the Applicants asked to be paid termination indemnities. The Administration rejected this request on 5 September 1991, on the ground that "the Agency Rules do not provide for payment of any Termination Indemnity to any staff member who resigns his job at his own will before reaching the age of early voluntary retirement."

After a further exchange of correspondence between the respective Applicants and the Respondent, on 12 December 1991, the Applicants lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its reports, on 23 April 1992. Its findings and recommendation in cases Bakr, Abbas, Yasin, Sha'bi and Tamim read as follows:

"11. Findings...

The Board examined the appeal, the Administration's reply and the Applicant[s]' observations on it. The Board focused on the content of paragraph 3.6 of Personnel Directive A/4/Rev.4/Amend.9 effective 1 July 1980, titled 'Reinstatement of Teachers' and [finds] that it does not invoke [a] contractual relation between the Agency and the Applicant in any sense.

12. The Board ... also [finds] that only 'a staff member' can file an appeal against a disciplinary measure or on anything that touches on the terms of his/her appointment.

13. In this context, the Board finds that the Applicant's case does not qualify to invoke the competence of the Board as the matter raised is outside its jurisdiction and at the material time, the Applicant did not have the status of a staff member of the Agency.

RECOMMENDATION

14. In view of the foregoing, the Board submits that it lacks jurisdiction to entertain such an appeal and therefore, without prejudice to any other submission as may become necessary, makes its recommendation to declare this appeal case unreceivable."

Its findings and recommendation in the Mi'ari case read as follows:

> "10. The Board examined the appeal, the Administration's reply and the Applicant's observations on it. The Board focused on the content of paragraph 3.6 of Personnel Directive A/4/Rev.4/Amend.9, effective 1 July 1980, titled'Reinstatement of Teachers' and [finds] that it does not invoke [a] contractual relation between the Agency and the Applicant in any sense; and on the provisions of Area Staff Rules 109.6 and 109.9 and [found] that the Applicant could not be indemnified for her services with the Agency.
>
> 11. The Board has also considered appeal procedures as stipulated in Staff Rule 111.3 which sets forth that only 'a staff member' can file an appeal against a disciplinary measure or on anything that touches on the terms of his/her appointment.
>
> 13[sic]. In this context, the Board finds that the Applicant's case does not qualify to invoke the competence of the Board as the matter raised is outside its jurisdiction and at the material time, the Applicant did not have the status of a staff member of the Agency.
>
> RECOMMENDATION
>
> 14. In view of the foregoing, the Board submits that it lacks jurisdiction to entertain such an appeal and therefore without prejudice to any other submission as may become necessary, makes its recommendation to declare this appeal case unreceivable."

On 13 May 1993, the Officer-in-Charge, Headquarters, UNRWA, transmitted to the Applicants copies of the JAB's reports and informed them as follows:

> "...the Board has concluded that it has no jurisdiction to consider your application, which was held to be not receivable.
>
> I accept this conclusion and your application therefore stands dismissed."

On 10 October 1992, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Area Staff Rules can only be amended without prejudice to the acquired rights of staff members.

2. Staff members, including the Applicants, were not properly notified of changes to the Personnel Directive A/5/77.

Whereas the Respondent's principal contentions are:

1. The Area Staff Regulations and Rules governing the Applicants' appointment when they resigned from service and/or applied for re-employment did not assign jurisdiction to the United Nations Administrative Tribunal, which is therefore without competence ratione materiae to entertain the present application.

2. The United Nations Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA Area staff members when the cause of action arose before 14 June 1991.

3. The Applicants have no standing to bring their claim.

4. The Applicants' claims against the Respondent are time-barred.

5. There is no evidence that the Respondent's decision was in any way improper.

The Tribunal, having deliberated from 27 June to 20 July 1994, now pronounces the following judgement:

I. As all the Applicants' claims are related and have been submitted jointly, the Tribunal decides that they should be joined and dealt with in one judgement.

II. The Respondent's first legal argument is that the Area Staff Regulations and Rules governing the Applicants'appointments when they resigned from service and/or applied for re-employment did not assign jurisdiction to the United Nations Administrative Tribunal which is, therefore, without competence ratione materiae to entertain the present application.

This argument is based on the fact that the Applicants were area staff members and therefore subject to the Area Staff Regulations and Rules. These regulations and rules were amended on 14 June 1991, to give staff members a broader range of remedies in respect of administrative disciplinary decisions taken by the Agency. As the Applicants' resignations from the service and their subsequent applications for re-employment took place prior to 14 June 1991, they come under the scope of the rules and regulations that obtained prior to 14 June 1991.

III. The Applicants each appealed to the Joint Appeals Board (JAB) which found the appeals to be unreceivable. The Commissioner-General accepted the Board's conclusions.

In his legal argument, the Respondent describes UNRWA as a subsidiary organ of the General Assembly established under resolution 302(iv) of 8 December 1949, to deal with a specific emergency situation. The Agency is of a temporary nature and the General Assembly has, in recognition of this, granted the Director, now the Commissioner-General of UNRWA, broad powers to deal with all aspects of its work, including the recruitment and management of staff. Thus, under paragraph 9(b) of General Assembly resolution 302(iv), the Commissioner-General was authorized to select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, and in accordance with the Staff Regulations and Rules of the United Nations as the Commissioner-General and the Secretary-General would agree should be applicable.

IV. For operational and historical reasons, UNRWA's approximately 19,000 staff have been divided into two entirely separate categories, with separate conditions of service. A very limited number (about 175) belong to the category of "international staff" and are governed by the set of staff regulations and rules known as the International Staff Regulations and Rules which are virtually identical to the 100 Series of the United Nations Staff Regulations

and Rules. This category of staff has always had access to the Administrative Tribunal. The rest of the UNRWA staff, comprising the majority, are governed by the Area Staff Regulations and Rules which were amended on 14 June 1991.

V. The main innovations brought about by these amendments were that area staff members could from then on (a) appeal against any administrative decision alleging non-observance of their terms of appointment and against any type of disciplinary action, and (b) appeal to the United Nations Administrative Tribunal.

VI. The Respondent contends that the Applicants, as area staff members, were governed at the time they submitted their resignations and/or applied for re-employment, by the special set of Area Staff Regulations and Rules referred to in paragraphs III and IV above. These regulations and rules, which provided for recourse procedures against an administrative decision to terminate services or disciplinary action under Regulation 10.3, were the only ones that governed the Applicants' appointments, and they made no reference to the United Nations Administrative Tribunal. As recognized by the Tribunal in Judgement No. 70, Radicopoulos vs. UNRWA, the right to make applications to the Tribunal can be denied in certain cases. The Respondent's submission is that, therefore, the United Nations Administrative Tribunal has no competence ratione materiae to review the substance of the decisions taken before 14 June 1991, not to re-employ the Applicants.

VII. The Respondent further contends that the United Nations Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA staff members when the cause of action arose before 14 June 1991; that the amendments of 14 June 1991 should be construed as having a prospective effect; that the recourse procedures provided therein can only be invoked when the cause of action arose on or after that date; that the decisions not to re-employ cannot, therefore, be appealed to the Administrative

Tribunal. The Respondent also refers to important policy reasons for ensuring that all administrative decisions taken by the Agency before 14 June 1991 should not automatically be open to review by the Administrative Tribunal. There would, he argues, be serious administrative consequences in allowing some 19,000 area staff members to question administrative decisions taken as far back as forty years.

VIII. The Tribunal, in dealing with the Respondent's contention that it is without competence to entertain the applications, must take cognizance of its own previous approach in this area and, indeed, to the most recent case in which it dealt with this question, Judgement No. 628, Shkukani vs. UNRWA (1993).

The Tribunal considers the Respondent's reference to Radicopoulos to be selective. In that case, while indicating that no mandatory provisions instituting another procedure had been laid down at the relevant time, the Tribunal considered itself competent to deal with the application on the basis of the agreement pursuant to General Assembly resolution 302(iv) referred to in paragraph III above. In the earlier 1955 case of Hilpern (Judgement No. 57), the Tribunal also rejected the Respondent's contention that "the Tribunal is competent to hear applications from staff members of the United Nations Secretariat only." The Tribunal refers to these early cases merely to indicate that it was of the view that it was not precluded from hearing cases involving staff members such as the Applicants, there being no other judicial forum for dealing with such cases.

In the more recent case of Zafari (Cf. Judgement No. 461, (1989)) the Tribunal made reference to the following advisory opinion of the International Court of Justice of 13 July 1954: "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of

any disputes which may arise between it and them" (Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion on 15 July 1954, I.C.J., Reports 1954, p. 57).

IX. The Tribunal restated this view as recently as last year in the Shkukani case, that it is competent to entertain cases, such as this one, where the primary concern is the absence of any judicial procedure established by the Area Staff Regulations and Rules for the settlement of disputes submitted to the JAB. Indeed, the Tribunal is surprised, in view of the clear and unequivocal finding in the Shkukani case, that the Respondent seeks, yet again, to make this argument.

X. Any body to which these Applicants had recourse under the Area Staff Regulations and Rules was an internal body. The Applicants should have had available to them, in fairness and equity, an external judicial body to which they could have appealed. The international staff members of UNRWA had such recourse but not the area staff members. There can be no justification for this.

XI. The Tribunal, therefore, rejects the Respondent's argument that the Tribunal is without competence ratione materia and ratione temporis to receive the application.

XII. Nor can the Tribunal accept the Respondent's arguments which are based on reasons of policy and practical difficulties. To do so, would be to hold that equity and justice should take second place to mere practicalities and administrative difficulties.

XIII. The Respondent also argues that the Applicants have no standing to bring their claim, as they have not alleged the non-observance of their employment contracts and as they were not staff members. The Respondent refers to the JAB's determination that it did not have competence to entertain the Applicants' appeal on the grounds that their claims "did not invoke a contractual relation

between the Agency and the Applicants" and that they were not staff members as defined by the Staff Rules at the time the alleged claims arose.

The Respondent cites article 2 of the Statute of the Tribunal, which he says, limits the Tribunal's competence to applications alleging non-observance of contracts of employment of staff members, including all pertinent regulations and rules in force at the time of the alleged non-observance. Therefore, according to the Respondent, standing to bring an application to the Tribunal depends on the non-observance of an employment contract by the Agency in relation to a staff member. In the absence of such a contract, and allegations of its non-observance, the Applicants have no standing to bring the action and the Tribunal is not competent to receive the application. The Respondent submits that the Applicants fail on both grounds.

XIV. While it clearly is the case that the Applicants were not staff members following their resignation, can one say validly that this cuts them off from recourse to the appeal procedures? Does it mean that the Tribunal is not competent to hear their appeals?

In the Tribunal's view, the fact that the Applicants were not staff members does not necessarily deprive them of recourse. These, of course, are former staff members who filed appeals relating to alleged non-observance of the terms of their contracts of employment.

XV. This brings the Tribunal to a consideration of the status of staff circular A/5/77 of 29 June 1977. Paragraph 10(c) states:

> "The Agency has agreed to amend the relevant Personnel Directive to provide that if a teacher resigns from the Agency to accept another teaching post within the Middle East and he subsequently applies for re-employment by re-instatement within two years from [the] date of resignation, the Agency will give him priority over new candidates who are equally qualified."

On 1 July 1980, the Administration issued Personnel Directive A/4 Rev.4/Amend.9. Paragraph 3.6 of this Directive states:

> "Re-employment of Teachers
> Teachers who have resigned from the Agency's service to accept other teaching posts within the Middle East, and who apply for re-employment by reinstatement within three years from the date of their resignation, will be given priority over new candidates who are equally qualified."

The Applicants resigned and subsequently applied for re-employment within the newly designated period of three years. They were not given priority on the grounds that the rules governing re-employment changed in 1985. The Applicants knew nothing of this change, but the Agency's attitude was that such ignorance can only be considered to have been culpable. The Agency's position was that their applications for employment would be considered on their merits with those of the other candidates.

In a letter dated 15 January 1989, the Deputy Director UNRWA Affairs, Syrian Arab Republic, noted that the Personnel Directive still contained the reference to "priority". However, he said that "that reference was cancelled in June 1983, at a Cabinet Meeting although the change may not have been made clear to all those who are now concerned with such problems". He also said that the existing position was that the appointment of staff should be strictly on the basis of merit and that the Personnel Directive was being revised.

XVI. It is clear that no reasonable effort was made by the Agency to inform its staff of this fundamental change. The Applicants resigned while under a misapprehension concerning the true position regarding priority in re-employment and this, through no fault of their own. It is the Tribunal's view, therefore, that this matter must be approached on the basis that the Personnel Directive, as amended in 1980, was still in force at the time of the resignations and subsequent applications for re-employment.

XVII. But what is the effect of the Personnel Directive? If one were to accept the Respondent's argument that the Directive was not a term of the Applicant's contract of employment, the Directive has no effect. Is it rational to seek to look upon this provision as being without enforceability and without purpose, simply because it was not written into the Applicant's contract? Surely not. Does it not seem illogical that the Applicants should have no right of redress if the Agency seeks to ignore this particular provision of the Personnel Directive? What is the purpose in having such a Directive at all if this were to be the case? It appears to the Tribunal to be only fair and just that the Personnel Directive carries within it the inference that if it were to be ignored, the Applicants would have a right of redress. On that basis, the Tribunal does not consider it an exaggeration to say that it is akin to being a term of the contract of employment and that it should be inferred to be a term of the contract of employment.

The Tribunal therefore rejects this argument.

XVIII. The Respondent then argues that the Area Staff Regulations, at the time of the impugned decisions, did not provide for appeal other than against the termination of services. The Respondent chooses to bolster his argument by reference to the Shkukani case, but he tends to be selective in his view of it. While he quotes the Tribunal's finding in that case, that it had to be considered in the light of the rules as they were prior to the date of the amendment, he ignores the thrust of the case to the effect that if such rules were discriminatory, they could not be relied on. Why should the Applicants be in a disadvantaged position now, when compared with others who can rely on a broader range of appeals against administrative decisions, including applications from staff members alleging non-observance of their terms of appointment? It offends equity and justice that this should be so. If it had been the intention to perpetuate that position, the provisions extending the jurisdiction of the Tribunal should have provided expressly for this result.

XIX. Finally, the Respondent argues that the claims are barred by lapse of time. This argument is based on the proposition that the JAB did not exercise its discretion to waive the time limits and properly held the Applicants' appeal not receivable. This statement does not represent the true situation. The JAB found the case not to be receivable on other grounds and the Respondent did not make the case to the JAB that the appeal was time-barred. Having failed to do so before the JAB, the Respondent cannot do so now and cannot seek to rely on a finding that was not made on that basis. This argument is rejected.

XX. The Respondent says that the Applicants have impugned the Respondent's discretionary administrative decision not to re-employ them as teachers, that their only allegation is that they were not accorded a right to re-employment, rather than that there was error in the Respondent's actions. This is not the Applicants' case. Their claim is that they were not given priority.

XXI. In view of its findings on the various matters raised by both parties, the Tribunal is of the view that it would be unjust and inequitable if the Applicants were not to be given priority in future allocation of posts. It must be remembered, however, that even with such priority, they, or at least some of them, might not necessarily be re-appointed in the immediate future.

Therefore, the Tribunal orders:

(i) That the Applicants be accorded priority for the posts for which they apply and for which they are qualified; and

(ii) If any of the Applicants is not appointed within 9 months from the date of this judgement, the Respondent pay to such

Applicant compensation equivalent to 12 months of his or her net base salary at the rate in effect at the time of such Applicant's resignation.

(Signatures)

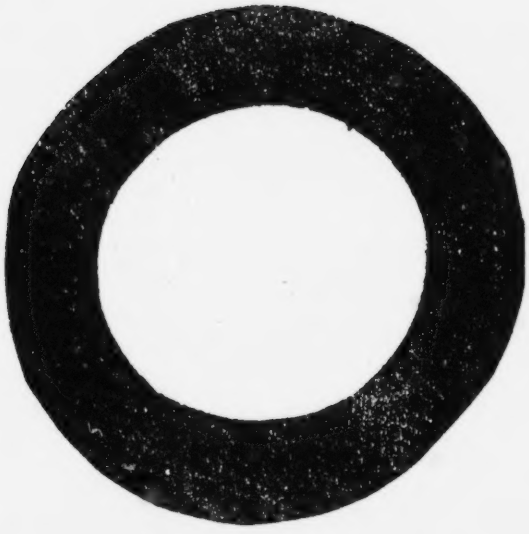
Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 20 July 1994

R. Maria VICIEN MILBURN
Executive Secretary



UNITED
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LIMITED

AT/DEC/651
20 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 651

Case No. 707: EL-SAID

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 2 May, 26 June and 24 July 1992, Ali El-Said, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees, hereinafter referred to as UNRWA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 August 1992, the Applicant, after making the necessary corrections, again filed an application requesting, inter alia:

> "...net salary for the period between the date of separation (15/02/1991) and the date of the Tribunal's decision."

Whereas the Respondent filed his answer on 3 June 1993;

Whereas the Applicant filed written observations on 6 December 1993;

Whereas, on 26 May 1994, the Applicant clarified that what he sought from the Tribunal was:

> "1. Compensation for the elapsed time since termination according to UNAT Statute and Rules.

2. Same or similar post or financial settlement.

3. ... In-service training..."

Whereas, on 27 June 1994, the Tribunal put questions to the Respondent to which he provided answers on 28 June 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 18 January 1990, as a Senior Vocational Training Instructor (Mechanic), grade 10, step 1 level, at the Siblin Training Centre in Lebanon. Under section 2 of the letter of appointment, his appointment was subject to probationary service of one year.

On 7 April 1990, the Deputy Principal and Chief Instructor, who was the Applicant's immediate supervisor, wrote to the Principal of the Siblin Training Centre to report on the Applicant's unsatisfactory performance. He stated that the Applicant had no control over his classes "due to his weak personality and due to [the] lack of knowledge of the material he is supposed to teach. Besides, he lacks reasonable judgement for solving problems or making decisions."

On 24 April 1990, the Principal of the Siblin Training Centre, through the Field Education Officer, recommended to the Field Personnel Officer that the Applicant's services with the Agency be terminated because of his inefficiency. The Field Education Officer, however, recommended that the Applicant be given more time to improve his work performance. In a letter dated 27 April 1990, the Principal warned the Applicant that as the quality of his work, both professionally and administratively, had been unsatisfactory, he should improve his performance. He added that: "Should no improvement show itself in your performance, appropriate action will be taken."

In a memorandum dated 9 January 1991, to the Field Education Officer, the Principal of the Siblin Training Centre evaluated the Applicant's performance. He noted that the Applicant had shown no improvement in his ability to control classes, nor in his

professional or administrative skills. He recommended that the Applicant be separated from the Agency "on the grounds of his inefficiency."

Also, in the Applicant's performance evaluation report, his principal supervisor, the Field Education Officer, stated on 6 February 1991: "Separation from service strongly recommended."

After an exchange of correspondence between the authorities at the Centre and the Headquarters Branch in Amman, and with the concurrence of the Director of UNRWA Affairs in Lebanon, on 13 February 1991, the Field Administration Officer informed the Applicant as follows:

> "I regret to advise you that your confirmation in the post of Senior Vocational Training Instructor (Mechanic) at Siblin Training Centre, was not recommended due to your unsatisfactory work performance.
>
> As per instructions in force, there is no other alternative but to terminate your services effective from the close of business on 15 February 1991, as per para. 7 of your Letter of Appointment dated 24 January 1990..."

On 21 February 1991, the Applicant requested the Field Administration Officer to review the decision to terminate his services. In a reply dated 1 March 1991, the Field Administration Officer informed the Applicant that the decision would be maintained "in view of the clear reasons which made it unavoidable."

On 15 July 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB), through a communication to the Director of Personnel at UNRWA Headquarters.

On 28 October 1991, the Secretary of the JAB informed the Applicant as follows:

> "Further to my letter of 12 September 1991, I hereby inform you that the preliminary consideration of your appeal case by the members of the Joint Appeals Board comprised of ..., has not eventuated the entertainment of your appeal case since you have failed to observe the time limits governing appeal procedures ... as in accordance with paragraph 3(B) of staff rule 111.3.

Attached please find a summary of the chronological sequence of events that have led to the aforementioned decision of the Joint Appeals Board, together with the relevant comments.

Event	Date	Comments
1. Decision to terminate your services with the Agency	13.01.91	
2. Your request to Administration to review its decision in your respect	21.02.91	Consistent with para. 2 of staff rule 111.3.
3. Administration's reply to your request	01.03.91	Consistent with para. 3 (B) of staff rule 111.3.
4. Your appeal to Secretary, Joint Appeals Board	15.07.91	Not consistent with para. 3 (B) of staff rule 111.3, as the ultimate date for appealing would have been 22 March 1991."

However, on 15 November 1991, one of the members of the Joint Appeals Board wrote to the Secretary of the Board, as follows:

"1. First, I would like to refer you to the content of my letter dated 8 October 1991 and addressed to Chairman JAB (a copy to you) where I assured the need of holding the Board as the case is considered justified.

2. I don't agree to the decision taken by Chairman JAB and I assure that I don't share ... the same view.

3. Regarding staff rule 3(B) III.3 [the Applicant] who is newly appointed, is not well aware of this rule.

4. Para. 4 of staff rule III.3 says that the Board may waive time limits in exceptional circumstances is applicable

to this case, as Lebanon in a whole is living the most exceptional circumstances.

5. So, and in light of the above-mentioned, I still request to consider the case and to hold the Board."

In a reply dated 21 November 1991, the Secretary, JAB, wrote to the member of the Board, as follows:

"With reference to your letter dated 15 November 1991, in respect of [the Applicant's] appeal case, please be informed that I have pursued the case further with the other Board members who constitute a majority on the Board and they confirmed their previous opinion of not entertaining the appeal case in question.

Therefore my letter ... dated 28 October 1991, addressed to [the Applicant] and copied to you stands as it is."

On 3 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate his employment with UNRWA, allegedly due to unsatisfactory work performance, was inappropriate and the assessment on which it was based was biased as a result of interpersonal conflict.

2. The UNRWA Joint Appeals Board did not consider his case.

Whereas the Respondent's principal contentions are:

1. The application is time-barred.

2. The Applicant's services were terminated upon completion of his probation, without prejudice, improper motivation or misuse of authority.

3. The Applicant's performance during probation demonstrated that he was not suited for permanent appointment with UNRWA.

4. The non-granting of a Teaching diploma from the UNRWA Institute of Education at Amman was not tainted by prejudice, improper motivation or misuse of authority.

The Tribunal, having deliberated from 27 June to 20 July 1994, now pronounces the following judgement:

I. The question to be decided by the Tribunal is whether the Applicant's case was considered by a properly established and convened joint appeals body.

II. The answers to the questions posed by the Tribunal to the Respondent, concerning the constitution and procedures followed by the Joint Appeals Board (JAB) in this case, disclose that two of the JAB members were stationed in Vienna and one in Lebanon. The issue of receivability of the Applicant's appeal was dealt with by the Secretary of the JAB, circulating a memorandum identifying the issue and requesting that the members communicate amongst themselves and notify him of their views.

The members of the JAB subsequently informed the Secretary of their views - the majority view being that the Applicant's case was not receivable. This so-called finding was transmitted to the Applicant. But, even after that, one of the members of the JAB was still seeking consideration of the case and the convening of a Board meeting.

III. The Applicant sought the convening of the JAB. His request was not granted and the JAB did not convene. One of the members of the JAB has expressed his dissatisfaction with the procedures adopted.

IV. The Tribunal holds that the procedures followed by the JAB in this case were flawed because the JAB never convened. The Applicant is therefore entitled to have his appeal heard by a

properly convened JAB. Accordingly, in accordance with its jurisprudence in Judgements No. 511, Parker (1991) and No. 598, Nicolas (1993), the Tribunal remands this case to the Respondent for proper consideration by the JAB.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 20 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/652
20 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 652

Case No. 689: SU'OUD

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 10 July 1992, Sa'id Khaled Su'oud, a staff member of the United Nations Relief and Works Agency for Palestine Refugees, hereinafter referred to as UNRWA, filed an application requesting the Tribunal to order, inter alia:

"...

(b) Rescinding the decisions of the Respondent ..., ordering the Applicant's transfer on demotion, and addressing him with a final warning...;

(c) Payment of compensation for the injury, humiliation and discrimination suffered by the Applicant ..., and the expenses sustained estimated at US$15,000;

(d) Declaring the proceedings ... being vitiated by abuse of procedure 'détournement de procédure' by not accepting my legal counsel, the retired area staff member, as my representative...;

(e) Ordering the Respondent's payment of the fees of my legal counsel."

Whereas the Respondent filed his answer on 22 January 1993;

Whereas the Applicant filed written observations on 15 April 1993;

Whereas, on 16 April 1993, the Applicant submitted additional pleas requesting the Tribunal "to hold oral hearings and to order the production of certain documents and files, ... [as well as] costs sustained which include mail fees, telexes to COMGEN [Commissioner General] [which are] estimated at US$800. ..."

Whereas, on 27 June 1994, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 28 December 1981, on a temporary assistance basis, as an area staff member, as a Cleaner in the Damascus Vocational Training Centre (DVTC). On 8 February 1982, his appointment was converted to a temporary indefinite appointment at the G-1, step 1 level. On 15 September 1982, the Applicant was transferred to the post of Guard "A", also at the DVTC. After completion of his probationary service of one year, the Applicant was promoted to G-2, step 1 level.

On 13 April 1991, the Principal of the DVTC informed the Acting Field Administration Officer in the Syrian Arab Republic of the theft of tools and consumable items at the DVTC, on 4 April 1991. According to the Principal, the Applicant did not pass on all the information he had regarding the theft. The Principal, accordingly, recommended that the Applicant be downgraded from grade 02 to grade 01 and transferred "to a post of Labourer or similar post grade 01 when a vacant post is available in the Centre."

On 20 April 1991, the Director of UNRWA Affairs in the Syrian Arab Republic appointed a Board of Enquiry to investigate the matter. On 21 May 1991, the Board submitted to the Field Director its report, which concluded that the Applicant had been involved in the misappropriation of tools and consumable items from the Centre and had "acted as an accomplice to Mr. Ibrahim Hourani

and assisted him in taking training supplies out from the Damascus Training Centre."

In a memorandum dated 13 June 1991, the Acting Field Administration Officer informed the Applicant that in the light of those conclusions:

> "... It has, therefore, been decided to demote you to grade 01 and to transfer you to a post of Sanitation Labourer grade 01 at Sbeineh Camp, Damascus Area, with effect from 15 June 1991.
>
> In view of the foregoing, this letter is a final warning. If your work performance should again be the subject of complaints, or any future misconduct, the Agency will be obliged to take appropriate action. Such action may include your immediate dismissal from the Agency's service."

On 14 July 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 6 October 1991, the Applicant requested the Field Director to review the administrative decision of 13 June 1991. In a reply dated 9 October 1991, the Officer-in-Charge at the Field Office informed the Applicant that the decision would be maintained.

The JAB adopted its report on 4 February 1992. Its evaluations and recommendations read, in part, as follows:

> "IV. Evaluations
>
> 1. The report of the Board of Enquiry which propelled findings made upon investigations, queries and hearing testimonies of witnesses does not lack any credibility, as is alleged by the Appellant, for the following reasons:
>
> ...
>
> The Board believes that the Administration's decision of transferring the Appellant on demotion effective 15 June 1991, has also given him a real chance to remain in the Agency's service, thus enabling him to cater to his needs, with a view to improved performance and devotion while conforming to Agency Rules and Regulations.

V. Recommendations

In view of the foregoing, the Board unanimously makes its recommendations that

1. The Administration's decision of 13 June 1991 in respect of the Appellant be upheld, and

2. That the case be dismissed."

On 18 June 1992, the Commissioner-General transmitted to the Applicant a copy of the JAB's report and informed him as follows:

> "I have examined the report of the Joint Appeals Board and accept the conclusions arrived at by the Board. I must, therefore, inform you that the Administration's decision to transfer you on demotion will stand."

On 10 July 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to produce documents or witnesses to support his views.

2. The Applicant's alleged accomplice provided the Respondent with material evidence to show that the incident of 4 April 1991 occurred on written instructions from the Principal.

3. The Respondent's decision constitutes a détournement de pouvoir.

4. The Applicant was entitled to be represented before the JAB by outside counsel.

Whereas the Respondent's principal contentions are:

1. It is within the discretionary authority of the Commissioner-General to allow representation by serving staff members only to make the JAB procedure more efficient.

2. In view of the exceptional circumstances of his case, involving the security of witnesses, the Applicant should not be given access, as he requested, to the identity of trainees and

staff members and of witnesses whose names have been deleted from the first report of the Board of Enquiry.

3. The decision to demote the Applicant was based essentially on the report of the Board of Enquiry.

4. The Applicant's conduct could have justified a more severe disciplinary measure than transfer on demotion.

The Tribunal, having deliberated from 27 June to 20 July 1994, now pronounces the following judgement:

I. This case is closely related to the case dealt with by the Tribunal in its Judgement No. 654, Hourani, rendered today.

II. The Tribunal notes that the Respondent was strictly applying the Area Staff Rules in deciding who could represent the Applicant before the JAB.

III. The Respondent demoted and transferred the Applicant to the post of Sanitation Labourer, with effect from 15 June 1991. He also took disciplinary action against Mr. Ibrahim Hourani, another area staff member, by terminating his services. The basis of the Respondent's action seems to be that both of them were involved in the theft of considerable stores from the DVTC. While Mr. Hourani was mainly responsible for organizing and directing these thefts, spread over a long period of time, the Applicant was merely his accomplice, carrying out his wishes and instructions.

IV. The thefts of equipment from the DVTC had been continuing for quite a while, but because of poor administration, combined with little or no supervision and control, nothing came to the notice of the Agency until 4 April 1991, when the Principal, DVTC, was informed that "a substantial theft of tools and consumable items had taken place". The Principal made a preliminary investigation and eventually a Board of Enquiry was established.

On 21 May 1991, the Board submitted its report, entitled "Misappropriation of Tools and Consumable items as well as other irregularities in the Damascus Training Centre". It concluded with a scathing criticism of Mr. Hourani and identified the Applicant as one of his accomplices. It stated inter alia that had the Board had time to investigate more in this direction, "there existed a realistic chance to detect another accomplice of Mr. Hourani". This Board of Enquiry was followed by an "Operational Audit Report on Vocational Training Centre in Damascus" which establishes, with proof and conviction, that much was remiss in the Administration of the Centre. The Respondent now asserts that most of the audit report's recommendations have been properly implemented.

V. Be that as it may, the Tribunal considers that these investigations and reports, as well as the report of the JAB, show conclusively that there were many opportunities in the DVTC for corruption and other wrong-doings and that apart from the Applicant, there were many others who might have been guilty of misdemeanours of some kind. However, such a conclusion has no relevance to deciding if the Applicant was properly found to be responsible for thefts which undoubtedly occurred. The Tribunal considers that the Applicant cannot escape his own responsibility by simply pointing an accusing finger at others.

VI. Before determining the main issue - whether the culpability of the Applicant has been properly established and the consequent punishment correctly imposed - the Tribunal will deal with some peripheral issues raised by the Applicant.

The Applicant asks for various documents and testimony on which, he asserts, the Respondent based his opinion adverse to the Applicant. These have been denied to him. He adds that he was deprived of the opportunity to cross-examine witnesses. The Respondent argues that, in the circumstances of the case, making available some of the evidence and/or identifying several of the witnesses would expose them to physical violence and other threats.

The Tribunal holds that the procedure followed by the Respondent in the particular circumstances of this case, did not adversely affect the rights of the Applicant, and consequently, did not lead to a miscarriage of justice. This conclusion is strengthened by the painstaking way in which the Board of Enquiry set about its task to determine the course of events, particularly those of 4 April 1991, when the loss of much material, through theft, was suffered by the Agency. Furthermore, the Tribunal considers that the evidence available to it is adequate for deciding whether the Applicant has been fairly treated or not.

VII. The Tribunal has considered, with special attention, four important documents: The Report dated 13 April 1991 of the Principal (who died early in 1992); the Report of the Board of Enquiry of 21 May 1991; the Audit Report of the DVTC of 15 November 1991, covering all the activities of the Centre, and the JAB report of 12 May 1992. Leaving aside the Audit Report, whose criticism the Respondent accepts and which lends some strength to the Applicant's contention that many others in the DVTC could have been involved in wrong-doings, the Tribunal finds that, despite minor shortcomings and deficiencies, both of reference and language (often translation from Arabic), all the reports have made serious and conscientious efforts to establish the truth about the widespread theft of the Agency stores at the DVTC and to assess the Applicant's responsibility in some of them. They are unanimous in concluding that the Applicant was involved, as an accomplice of Mr. Hourani, the principal culprit. The Tribunal finds no reason to disagree. All the criticisms, objections and innuendos which the Applicant has levelled not only against the reports, but also against the witnesses and the evidence on which the Respondent relied, do not, in the view of the Tribunal, contradict the broad conclusions reached by the Board of Enquiry, and later upheld by the Joint Appeals Board.

VIII. The disciplinary measure taken by the Respondent - demotion with transfer - is entirely within the discretion of the Respondent. The Applicant has not produced any convincing evidence of bias, prejudice or other extraneous factors which might vitiate the exercise of such discretion. In a place where people work in close proximity to each other, the Principal's views on the Applicant's involvement might be widely known in advance. Even if the Applicant's statement of 22 September 1991, (four months after the Board of Enquiry Report), suggesting that the punishment of the Applicant had been decided in advance were true, it would make no material difference to the conclusion reached by the JAB.

IX. In the circumstances of the case and consistent with its jurisprudence that in disciplinary matters the Respondent has broad discretion, provided there is no proof of bias, prejudice or other similar extraneous factors, the Tribunal holds that the Respondent exercised his discretion properly, taking into account the Applicant's secondary role in the activities of Mr. Hourani.

X. In view of the foregoing, the Tribunal rejects the application as well as the Applicant's request for costs.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 20 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

"3. Costs sustained represent[ing] secretarial work, including translation of letters and documents at the different stages ... mail fees, telexes to Respondent ... estimated roughly at US$450. ..."

and

"... an average extra expense of US$250 a month over the moral and physical injury done to him ... as ... [on account of the contested decision] the Applicant is compelled to live far from his family in Damascus."

Whereas the Applicant filed written observations on 22 April 1993;

Whereas, on 27 June 1994, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 28 June 1994, the Tribunal put a question to the Respondent to which he provided an answer on 30 June 1994;

Whereas, on 5 July 1994, the Applicant submitted additional statements and on 8 July 1994, the Respondent provided his comments thereon;

Whereas, on 13 July 1994, the Applicant submitted a further statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA, on 4 August 1981, as an Administrative Clerk, on a temporary basis, at the Homs/Hama Area Office in the Syrian Arab Republic. He was later given a temporary indefinite appointment as a Welfare Worker at the grade 7, step 1 level, with effect from 1 April 1984.

On 20 June 1991, the Field Relief and Social Services Officer in the Syrian Arab Republic reported that the Applicant had allegedly falsified a prison certificate, in order to entitle a family of a refugees to food rations normally reserved for "special hardship cases". The Applicant initially denied any involvement, but finally admitted that he had falsified the document, claiming to have done so under threat to his life. The Field Relief and Social

Services Officer recommended in his report that the Applicant be demoted to a lower post, as a disciplinary measure.

On 25 June 1991, the Acting Director of UNRWA Affairs in the Syrian Arab Republic asked the Field Administration Officer to convene and chair an ad hoc Board of Enquiry to investigate the circumstances of the falsification of documents. He also instructed the Field Administration Officer to suspend the Applicant without pay until further notice. On the same day, the Field Administration Officer informed the Applicant of the suspension.

In its report dated 29 July 1991, the Board of Enquiry recommended, in part, as follows:

> "...
>
> 8. To prevent a dangerous precedent by allowing refugees to succeed in gaining rations by threat, and to make it clear to all social workers that falsification of documents is not tolerated, severe disciplinary action is recommended. On the other hand, it should be taken into account that [the Applicant] is a timid, fearful man and committed his act under pressure. Whether he is fit to continue as a social worker or [in] another capacity, would have to be determined by his supervisors.
>
> ..."

On 15 August 1991, the Field Administration Officer wrote to the Applicant, advising him that in the light of the findings of the Board of Enquiry "it had been decided to transfer [him] with demotion" from his present post to the post of Clerk "D" at the Area Registration Office in Damascus, or Clerk "C" at the Field Supply and Transport Department, also in Damascus, both posts being at grade 5. The Applicant was asked to advise whether or not he accepted his transfer to one of these posts. The Field Administration Officer added:

> "I have to advise you further that if you should not accept the above transfer, your services shall then be terminated in the interest of the Agency under the provisions of area staff regulation 9.1 and area staff rules 109.1 and 109.9."

On 25 August 1991, the Applicant accepted the transfer to the post of Clerk "C" at the Field Supply and Transport Department. On the same date, the Field Personnel Officer advised the Applicant that the transfer would take effect on 3 September 1991.

On 26 August 1991, the Applicant wrote to the Director of UNRWA Affairs for the Syrian Arab Republic requesting a copy of the report of the Board of Enquiry, together with an explanation of the reasons for the disciplinary action imposed upon him.

In a reply dated 7 September 1991, the Director transmitted to the Applicant a copy of the Board of Enquiry's report. He added:

> "Based on the findings of the Enquiry Board and the recommendation of your supervisors, I have decided to transfer you on demotion to a clerical post. Because there was no vacant post in the Central Area to which you could be accommodated, you were transferred to the post of Clerk 'C' at Supply and Transport Department of Damascus."

In a letter dated 15 September 1991, the Applicant requested the Field Director to review the decision to transfer him on demotion for disciplinary reasons. The Applicant admitted having forged documents to support entitlements to "special hardship cases" rations, but contended that he had done so under threat from a violent person. On 28 September 1991, the Field Director informed the Applicant that he had decided to maintain the decision in view of the breach of trust committed by the Applicant.

On 10 October 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 23 April 1992. Its recommendations read as follows:

> "9. Recommendations
>
> (a) The Board unanimously and, after a thorough consideration of all aspects of the case, recommends that the Administration's decision be upheld and the case be dismissed.
>
> (b) However, for humanitarian reasons, the Board wishes to recommend that the Appellant be given a consideration of transfer to Hama in his same present grade and salary whenever a suitable opportunity arises and without

> prejudice to the interests of the Agency, which interests remain paramount."

On 15 May 1992, the Officer-in-Charge, Headquarters, UNRWA, transmitted to the Applicant a copy of the Board report and informed him as follows:

> "... As you can see, the Board has recommended that the Administration's decision be upheld and the case dismissed. I accept these conclusions, and the contested decision will therefore stand.
>
> As for the Board's recommendation that you be transferred to a post in the Homs Area, provided that it is not prejudicial to the interest of the Agency, I understand that the Field Administration has already informed you that it would be done as soon as a suitable post at your current level becomes available."

On 30 July 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was threatened by a professional murderer and thus acted in fear of his life.

2. In the circumstances, the Respondent's decision was arbitrary.

Whereas the Respondent's principal contentions are:

1. The decision to impose a disciplinary measure upon the Applicant was based on objective evidence of misconduct and constituted a valid exercise of the Commissioner-General's discretionary authority.

2. The Applicant's transfer on demotion was made in accordance with the Agency's regulations and rules.

3. The Applicant has failed to demonstrate that the impugned decision was flawed by a mistake of fact, an error of law, a denial of due process or was vitiated by extraneous or prejudicial factors.

The Tribunal, having deliberated from 27 June to 20 July 1994, now pronounces the following judgement:

I. This is a simple case in which the Applicant, a Social Welfare Worker at Homs falsified a "prison certificate under threat or the impression of threat" which would have entitled the family of Mr. Yasin Qudsi to receive rations reserved for "Special hardship cases". Mr. Qudsi was in prison, convicted of manslaughter, when these rations were first allotted to his family. But, even after his release, when he saw the Applicant on or about 23 May 1991, he insisted that his family should continue to receive rations as before, and in fact, received from the Applicant a forged certificate of entitlement to rations.

II. The Applicant first denied and later confessed that he had provided a forged certificate, entitling Mr. Qudsi's family to receive rations, apparently worth $40.00. He was suspended on 25 June 1991. A Board of Enquiry was set up. In its report, dated 29 July 1991, the Board concluded that the Applicant's guilt had been established. In recommending severe disciplinary action, the Board added: "On the other hand it should be taken into account that Mr. Hayek is a timid, fearful man and committed his act under pressure." The Respondent, who had lifted his suspension order with effect from 21 July 1991, demoted the Applicant and transferred him with effect from 3 September 1991, from Homs (his home area) to Damascus - a distance of about 250 kilometers. The Applicant has a large family, with some handicapped children, and aged and sick parents. The family had to be looked after from a distance and with a reduced income. The Respondent was not insensitive to the Applicant's plight and considered the disciplinary measures taken against him "the mildest possible under the circumstances." The Applicant persuaded the JAB to recommend that the Respondent make an effort to transfer him closer to home when a suitable opportunity arose to do so.

III. As a consequence of the JAB recommendation, the Respondent informed the Applicant, on 15 May 1992, that he would be transferred to the Homs area as soon as a suitable post in his current grade became available. In a reply to a question put by the Tribunal, the Respondent stated that with effect from 1 April 1994, the Applicant was transferred "to the post of social worker in the Syrian Field Office Control Area, which is where Homs is located. [The Applicant's] posting is at grade 7, step 12, which was his grade prior to demotion. [The Applicant] is currently working in this post."

IV. This transfer would have settled the problem, except that it took the Respondent nearly two years to effect it. The Applicant complains that the Respondent could have kept his promise to transfer the Applicant back to the Homs area earlier if he had been so inclined. The Tribunal notes that the Respondent has often stated he was fully aware of and sensitive to the Applicant's circumstances. The Tribunal, therefore, finds some substance in the Applicant's complaint, but cannot judge definitively whether the Respondent could, in keeping with the rules, practice and interest of the Agency, have given the promised relief to the Applicant earlier.

V. However, in view of the circumstances - some of them extenuating - in which the Applicant committed and later admitted a serious error, and also, recognizing the sympathy and understanding shown to the Applicant by the Respondent, the Tribunal, nevertheless, considers that for having been obliged to stay away from his home on demotion for nearly three years with consequent hardship, he is entitled to some compensation for the delay which took place in moving him back to the Homs area. The Tribunal assesses this compensation at US$1,000.00.

VI. The Applicant has requested in his pleas "Payment of fees and expenses including the legal counsel's fees." He has also

requested, in his additional pleas "Costs sustained ... including translation of letters and documents ... mail fees, telexes to Respondent, which is estimated roughly at US$450.00" The Tribunal, in keeping with its jurisprudence (Judgement No. 237, Powell (1979)), awards him the sum of US$250.00 only.

VII. In view of the above, the Tribunal orders the Respondent to:

(a) Pay to the Applicant a sum of US$1,000.00.

(b) Pay to the Applicant the sum of US$250.00, as legal expenses.

(Signatures)

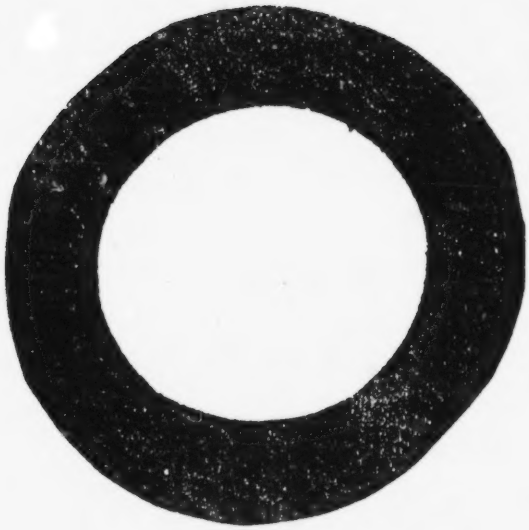
Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 20 July 1994

R. Maria VICIEN-MILBURN
Executive Secretary



UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/654
20 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 654

Case No. 692: HOURANI

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 20 August 1992, Ibrahim Fu'ad Hourani, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees, hereinafter referred to as UNRWA, filed an application requesting the Tribunal to order, inter alia:

"...

ii. Rescinding the decision of dismissal, considering the period of cessation as special leave with full pay, and refunding to the Applicant the amount of $710 discounted unjustifiably from the Applicant's provident benefits.

iii. Compensating the Applicant for the severe injury [caused by] ..., abuse of authority, exercised intentionally and persistently by the Respondent, estimated at $200.000.

...

v. Payment of all expenses and fees the Applicant sustained including the legal counsel's fees."

Whereas the Respondent filed his answer on 17 December 1992;

Whereas, on 26 April 1993, the Applicant filed written observations on the Respondent's answer as well as incidental pleas in which he requested, in part:

> "Costs sustained represent[ing] secretarial work including the translation of documents, photo copying, seeking criminal technical expertise, during the different stages of the appeal, ... [and also] ... mail and telexes fees, typing, etc ... estimated at $2,000.00. "

Whereas, on 27 June 1994, the President of the Tribunal ruled that no oral proceedings will be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA as a Trades Instructor, Plumbing, at the Damascus Vocational Training Centre (DVTC), on 1 September 1986, on a temporary indefinite appointment at the grade 8, step 1 level. After satisfactory completion of his probationary period, the Applicant's appointment was confirmed, with effect from 1 September 1987. He remained in the same post, at the same level, until the termination of his services on 18 June 1991.

On 13 April 1991, the Principal of the DVTC informed the Acting Field Administration Officer in the Syrian Arab Republic that a substantial theft of training supplies had taken place at the DVTC on 4 April 1991. He described how the theft had been committed, based on the statements of different witnesses who reported the incident to the Principal. In his conclusion, the Principal identified the Applicant as "the major [perpetrator] responsible" for the theft and recommended his suspension without pay. He also recommended that if the Applicant did not resign, his services with the Agency should be terminated with effect from 16 April 1991.

On 20 April 1991, the Director of UNRWA Affairs in the Syrian Arab Republic appointed a Board of Enquiry to investigate the matter. Also on 20 April 1991, the Applicant was advised by the Acting Field Administration Officer that he would be suspended from service pending an investigation.

In its report to the Field Director, dated 21 May 1991, the Board of Enquiry concluded that the Applicant had "not only caused substantial losses to the Centre's property over several years, but has shown himself as a man of considerable brutality".

On 18 June 1991, the Field Administration Officer informed the Applicant as follows:

> "...this is to advise you that based on the findings of the Board of Investigation, it has been decided to terminate your services with the Agency for misconduct, effective Close of Business on 19 April 1991, under the provisions of area staff rule 110.1.
>
> In the circumstances, you shall not be entitled to any termination indemnity. Anyway, you shall be paid your credits and exceptionally the Agency credits standing to your name in the Provident Fund Account."

In an undated letter sent in August 1991, the Applicant requested the Field Director to review this administrative decision.

On 6 August 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 12 May 1992. Its findings and recommendation read, in part, as follows:

"IV. ...

1. The report of the Board of Enquiry which propelled findings made upon investigations, queries and hearing witnesses does not lack any credibility, as is alleged by the Appellant due to the following reasons:

(a) the constituency of the Board of Enquiry comprised Agency staff members that the Appellant and the Administration raised no question about their impartiality or credibility and thus, ..., could not have been motivated by prejudice against the Appellant;

...

2. The Board contends that the Appellant's evidence to establish his obtainment of a permission from the late Principal, DVTC, to take tools and materials to outside the DVTC for the purpose of training an engineer does not furnish

sufficient grounds for the Appellant's acquittal as balanced against testimonies not in the Appellant's favour and which referred to habitual acts of misappropriation over years carried out by the Appellant.

3. The Appellant's allegation that misappropriations were taking place in other parts of the Centre, does not, ..., provide any materiality, relevance or coherence to the Appellant's defence against the findings of the Board of Enquiry convicting him.

4. After a thorough consideration, the Board finds it difficult to see how the late Principal, DVTC, could have been personally motivated against the Appellant. This is based on the failure of the Appellant to provide material evidence to that effect and which could, if [it] existed, impel concurrence with the Appellant's allegation.

V. Recommendation

In view of the foregoing, the Board unanimously makes its recommendation:

1. The Administration's decision of 18 June 1991, in respect of the Appellant, be upheld, and

2. That the case be dismissed."

On 18 June 1992, the Commissioner General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"I have examined the report of the Joint Appeals Board and accept the conclusions arrived at by the Board. I must, therefore, inform you that the Administration's decision to terminate your services will stand."

On 20 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's services is unfounded and was based on false allegations, fabricated by the Principal of the Centre.

2. The JAB recommendations were biased and based on an unsubstantiated erroneous preconception of the facts.

3. The Applicant was not allowed to cross examine witnesses.

4. The Applicant was entitled to be represented before the JAB by outside counsel.

Whereas the Respondent's principal contentions are:

1. It is within the discretionary authority of the Commissioner General to consider that the purpose of keeping the proceedings of the JAB straightforward and efficient is better served by allowing representation by serving staff members only.

2. In view of the exceptional circumstances of this case, where the security of witnesses is at risk, the Applicant should not be given access to certain documents that he requested.

3. The Respondent validly exercised his discretion to terminate the Applicant's appointment.

4. The gravity of the offence committed by the Applicant, i.e. wilfully plotting to [illegible] succeeding in stealing from the Agency, justified the disciplinary measure that was applied [illegible] his case.

5. The Applicant has failed to demonstrate that the impugned decision was flawed by a mistake of fact, an error of law, a deprivation of due process or was vitiated by extraneous or prejudicial factors.

The Tribunal, having deliberated from 27 June to 20 July 1994, now pronounces the following judgement:

I. The Tribunal notes that when the theft of stores in the DVTC was reported on 4 April 1991, the Respondent spared no time or effort to conduct proper investigations. As a result of these enquiries, it was established, beyond doubt, that large-scale misappropriation of stocks and consumer goods, spread over a long time and apparently involving a number of people, had taken place at the DVTC.

II. The Respondent admits, by implication at least, that one factor leading to the wide and systematic stealing of supplies of all kinds - entailing a substantial loss to the Agency - could have been the lack of timely and effective supervision. Although the Applicant had been in service for several years, the only audit report which the Tribunal has seen relates to the year 1991. It reveals that "over the preceeding years, failure within the DVTC to ensure compliance with the Agency's operational procedures caused a general breakdown in the internal control of supplies movement, stock-taking and surveyed Agency property". In this atmosphere of slackness of supervision and control, much pilfering took place and the Applicant was considered a major operator with at least one accomplice, Mr. Su'oud, whose case has been dealt with by the Tribunal separately, in its Judgement No. 652, signed today.

III. The Applicant repeatedly challenges all aspects of the handling of the charges brought against him by the Respondent. He asks the Tribunal for an oral hearing, the production and examination of documents already examined earlier by the Board of Enquiry, the JAB and even in the earlier enquiry held by the Principal, DVTC.

IV. In the long complaint of 38 pages (in Arabic and later in English) finally sent by the Applicant on 6 August 1991, to the JAB, he attempts to present a picture that he is innocent and honest and has been made a scapegoat for the losses suffered by the DVTC as a result of the wrong-doings of other people, particularly of the Principal. The Principal died early in 1992.

V. In his appeal to the JAB, the Applicant elaborated on his right to have a counsel of his choice and asked for a number of documents which, he asserted, had been wrongly denied to him. To the Tribunal, he has repeated many of his pleas before the JAB, including his request for numerous documents which, he claims, formed the basis of conclusions against him, arrived at as a result

of various investigations carried out by the Respondent. The Applicant also asks for the witnesses to be identified and cross-examined.

VI. The Tribunal has considered these requests. It has also taken into account the Respondent's objection that various witnesses and others would be exposed to risk and threat if the Applicant had access to their identities and statements.

The Tribunal has consistently maintained the right of Applicants to see all evidence against them and their right to cross-examine witnesses. The Tribunal notes that in certain exceptional circumstances, and so long as it is established to the Tribunal's satisfaction that the Applicant was afforded fair and legitimate opportunities to defend his or her position, extra precautionary measures to protect witnesses may be justified.

The Tribunal is of the view, that in this case - when evidence shows that witnesses are likely to be suborned or subjected to threats and physical harm - the Respondent would be justified in withholding certain information from the Applicant, including the identity of some witnesses and others involved in assisting the investigations. The Tribunal, therefore, considers that the material before it is adequate for its purpose and there has not been, nor will there be, any miscarriage of justice in this case. This decision of the Tribunal is in conformity with its views expressed in its Judgement No. 558, Faruq (1992).

VII. The Tribunal does not consider itself called upon to rule on who could and who could not represent the Applicant as his counsel before the JAB, inasmuch as in this and other matters the Respondent was following the area Staff Rules in force in 1991. Besides, the Tribunal does not find that the appointment of the counsel who eventually represented the Applicant before the JAB had the slightest adverse effect on his case.

VIII. The Tribunal, in considering the evidence presented to it, finds that the two main bodies - the Board of Enquiry established by the Agency, and subsequently the JAB, performed their work conscientiously and there is no ground to question their conclusions. The Tribunal notes that there were some difficulties and some minor irregularities, but none of them stood in the way of establishing that the Applicant was responsible, directly or indirectly, for the theft and misappropriation of stocks belonging to the Agency. If any credence is to be given to the protestations of the Applicant, there should have been some explanation as to why such a large number of people would have testified against him. Simply to assert blandly and repeatedly, but without any evidence, that he disagrees with the Respondent entirely and that all was concocted by the now dead Principal of the DVTC, carries little conviction. The Tribunal notes that many of the allegations against the Principal and the Respondent were made after the Board of Enquiry had come to its conclusions and in some instances, even after the JAB had made its recommendation on 12 May 1992.

IX. The Tribunal further notes that no objection was raised to the composition of the Board of Enquiry or of the JAB before they began their work, and finds that late complaints on these matters are not tenable. The Tribunal accepts that many other persons might have been involved, as suggested by the Applicant, in the large-scale abuse and misappropriation of stocks from the DVTC, but the issue before the Tribunal is not the guilt or innocence of other persons, but essentially the determination of whether the conclusions reached against the Applicant by the JAB are justified or whether he has been, as he claims, a victim of other people's intrigue, malice and conspiracy. Taking account of all the evidence before it, the Tribunal finds that the Applicant has not established his contentions. It therefore upholds the findings of the Board of Enquiry and the conclusions of the JAB.

X. The only question left for the Tribunal to consider is whether the penalty imposed on the Applicant - termination - was justified. The Tribunal notes that the disciplinary measure imposed was within the discretion of the Respondent and, in the circumstances of this case, cannot be considered excessive. Finally, the Tribunal states once again that in disciplinary cases, especially where large-scale corruption is rampant, it would not object to the liberal exercise of discretion by the Respondent, provided it is not tainted with bias, prejudice or similar factors. The Tribunal holds that, in this case, the Respondent exercised his discretion properly and that such exercise was not influenced by bias, prejudice, and other extraneous factors.

XI. In view of the above, the Tribunal rejects the application as well as the Applicant's request for costs.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 20 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/655
20 July 1994

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 655

Case No. 695: HABASH

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 12 May 1992, Abdallah Mohamad Habash, a staff member of the United Nations Relief and Works Agency for Palestine Refugees, hereinafter referred to as UNRWA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 August 1992, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia, to:

"...

7. Rescind all the disciplinary and financial measures which were applied against me.

8. Reinstate me to a post with a grade in parity to Area Registration and Distribution Officer.

9. Compensate me for all the financial recurring losses which were being entailed since my demotion.

..."

Whereas the Respondent filed his answer on 22 January 1993;

Whereas, on 9 March 1994, the President of the Tribunal requested the Respondent to produce an answer on the merits, which he did on 20 April 1994;

Whereas the Applicant submitted an additional undated document;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA as an area staff member on 1 September 1964, as Assistant Distribution Team Leader at the grade 2, step 1 level, on a temporary indefinite appointment. He served thereafter at the Jerusalem Field Office of the West Bank, having reached the grade 9, step 1 level, with the functional title of Area Registration and Distribution Officer.

During the period 16 May to 15 June 1989, the Agency undertook an operational audit of the Supply, Distribution and Warehousing Operations in the West Bank Field, being concerned about pilferage which was taking place there. In a surprise visit to the Jerusalem Area Stores, an auditor discovered irregularities, including the excessive loading of commodities on trucks for daily distribution.

The auditor made a second surprise visit to the Jerusalem Area Stores and found additional irregularities. He recommended that a Board of Enquiry be established to investigate the distribution operations of the Jerusalem Area Stores.

A Board of Enquiry (the Board) was appointed to investigate irregularities in the distribution of rations in the Jerusalem Area. Commencing its work on 23 August 1989, the Board found that the Distribution Team almost uniformly failed to follow the Agency rules and guidelines regulating the storage and distribution of commodities; that the Applicant "carried out no proper checking of

the figures on the distribution list sent to him by the Team Leader" and, given that he was "responsible for verification and modification of records, this was a serious dereliction of duty." The Board found that the Applicant's serious dereliction of duty constituted misconduct.

On 2 November 1989, the Director of UNRWA Operations in the West Bank informed the Applicant as follows:

> "... as the result of irregularities discovered by an audit and a Board of Enquiry into distribution of commodities with which you were involved, the Agency has decided, as a disciplinary measure, to suspend you without pay for a period of 30 days with effect from 3 November 1989, and upon completion of this suspension without pay to reassign you to another post which has yet to be identified."

On 19 December 1989, the Field Administration Officer informed the Applicant that he would be transferred to the post of Clerk "B", at the grade 6, step 20 level, at the Registration Office of the Jerusalem Area, with effect from 12 December 1989.

On 8 November 1989, the Applicant asked the Field Director to reconsider the decision to suspend him. In a reply dated 28 November 1989, the Field Director informed the Applicant that his decision would be maintained. After a further exchange of correspondence, on 21 February 1990, the Applicant wrote to the Director of Personnel at the Agency's Headquarters in Vienna, requesting that the Joint Appeals Board (JAB) be convened to examine his case. On 7 March 1990, the Director of Personnel informed the Applicant that the Secretary of the JAB had advised him that there was no basis for an appeal under area staff regulation 11.1 then in force.

On 30 April 1990, the Applicant wrote to the Field Director, requesting to be reinstated in his former post. In a letter dated 26 July 1990, the Field Administration Officer informed the Applicant that the decision to suspend him and to transfer him to another post was irrevocable.

On 26 July 1991, the Applicant lodged an appeal with the JAB. The Board adopted its report on 4 February 1992. The recommendation of the majority of the Panel reads as follows:

> "The disciplinary measure of transferring the Appellant on demotion arose on 2 November 1989 i.e. at a time when Staff Rules did not provide for dealing with an appeal case of the sort. Therefore, the Board submits and makes its recommendation to the effect that the appeal of [the Applicant] is out of time and consequently declares it as not being receivable for consideration by the Board."

In a dissenting opinion, one member of the JAB recommended as follows:

> "...
>
> 2. It remains a fact that the main objective of the Joint Appeals Board is trying to realize justice through reviewing the case(s) and making recommendations to the Commissioner-General. I am of the opinion that achieving this noble objective cannot and should not be blocked by procedural matters such as time limits, taking into consideration that the respective staff rule is flexible on this point. Please refer to staff rule 111.3(4).
>
> ..."

On 5 March 1992, the Commissioner General transmitted to the Applicant a copy of the JAB report and informed him as folows:

> "As you can see, the Board has declared that your 'appeal' is not receivable because it was submitted out of time. The Board has also considered that the cause of action arose at a time when the Staff Regulations and Rules did not provide for such remedy.
>
> I must therefore inform you that the Administration's decision of 2 November 1989, to transfer you to the post of Clerk B at the Jerusalem Health Centre will stand.
>
> ..."

On 28 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to suspend the Applicant was unjust and caused him financial hardship.

2. The Applicant was innocent and should not have been subject to disciplinary santions.

Whereas the Respondent's principal contentions are:

1. The Area Staff Regulations and Rules governing the Applicant's appointment at the time of its termination did not assign jurisdiction to the United Nations Administrative Tribunal, which is therefore without competence ratione materiae to entertain the present application.

2. The United Nations Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA Area staff members when the cause of action arose before 14 June 1991.

3. The Applicant is without locus standi.

4. The Applicant's claim against the Respondent is time-barred.

5. The evidence demonstrates that the Respondent's imposition of disciplinary measures against the Applicant was proper.

The Tribunal, having deliberated from 27 June to 20 July 1994, now pronounces the following judgement:

I. The Applicant was suspended without pay, with effect from 3 November 1989, "as a result of irregularities discovered by an

audit and a Board of Enquiry [looking] into distribution of commodities with which [he was] involved." Later he was transferred on demotion to another post. He made a number of complaints and representations, but the Respondent maintained his decision. The Applicant's main plea was that he was innocent and had been made a scapegoat as a result of malice and intrigue against him.

II. The preliminary question which the Respondent has raised is that at the time the Applicant's wrong-doings were discovered, the Tribunal had no jurisdiction over cases involving area staff members (such as the Applicant) who were governed by the Area Staff Regulations and Rules then in force. These were later modified on 14 June 1991, but as the incidents and events under consideration occurred before this date, the Respondent asserts that the Tribunal has no jurisdiction to decide this case. The Tribunal has already dealt with these contentions in its Judgements No. 628, Shkukani (1993) and No. 650, Bakr et al, rendered today. It will not address them here.

III. The question to be determined is whether the Applicant's appeal to the Joint Appeals Board (JAB) is time-barred. According to the JAB it is. The dissenting member of the JAB expresses his concern that justice might not be done if the Respondent's argument that the Tribunal was without competence were accepted. As stated above, the Tribunal has ruled on this matter in its judgement No. 628, Shkukani and in Judgement No. 650, Bakr et al, rendered today.

However, despite the understandable concerns expressed by the dissenting member of the JAB, the Tribunal is compelled to conclude,

as the JAB itself did, that, because of the period of time which elapsed before the Applicant lodged his appeal with the JAB, it is time-barred.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 20 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

"...

...to rescind the decision taken by the Chief, Personnel Service at UNOG and upheld by the Secretary-General of the United Nations, which denies me any right to payment of a repatriation grant.

..."

Whereas the Respondent filed his answer on 5 March 1992;

Whereas the Applicant filed written observations on 5 June 1992;

Whereas, on 17 June 1993, the Tribunal decided to adjourn consideration of the cases and to put questions to the Respondent, to which he provided answers on 25 August 1993;

Whereas in November 1993, the Tribunal decided to further adjourn consideration of the cases and on 9 February 1994, put additional questions to the Respondent, to which he provided answers on 9 March, 30 March and 6 April 1994;

Whereas the facts in the cases are as follows:

The Applicant Kremer, a French national, entered the service of the United Nations on 29 April 1971, as a Translator-Trainee at the P-2 level. After serving on fixed-term appointments and on a probationary appointment, he was given a permanent appointment with effect from 1 April 1973. His duty station was New York. The Personnel Action Form issued upon recruitment stated, inter alia, that the Applicant was "entitled to repatriation grant" to France. His place of home leave was Paris, France. After completing a one-year assignment at the Economic Commission for Africa in Addis Ababa, from 1 July 1976 through 30 June 1977, the Applicant returned to Headquarters and was promoted to the P-4 level as a Revisor, with effect from 1 April 1981. The Applicant was then assigned to the Economic and Social Commission for Asia and the Pacific in Bangkok, with effect from 11 January 1983. He was reassigned to the United

Nations Office in Geneva (UNOG) as a Translator, with effect from 13 August 1985. The Applicant separated from the Organization on 7 May 1991.

During his service at UNOG, the Applicant lived in Prévessin-Moens, a town located in the French "Zone franche du Pays de Gex et de la Haute Savoie" adjacent to Geneva. In a memorandum dated 10 August 1987, a Personnel Officer informed the Applicant, in connection with his request for home leave, that:

> "...The Staff Rules of the United Nations (rule 105.3, paragraph (a)) provide a right of home leave for staff members who are internationally recruited and serving outside their country of origin. In your case, as a French national, residing in France since 15 October 1985, you have unfortunately lost the right to home leave, an entitlement which you exercised during your service in other duty stations.
>
> I should also take this opportunity to remind you that while you are residing in France, you no longer have the right to a repatriation grant..." (Translation by the Tribunal)

On his separation from service, the Applicant was not paid a repatriation grant. In the Personnel Payroll Clearance Action Form issued in connection with his separation, it is stated under item 17 that he was not entitled to the repatriation grant because he "lived in France from 15.10.85 until c.o.b. [close of business]". Under item 15 of the same form, it is stated that the Applicant's residence after separation would be Paris.

In a letter dated 14 May 1991, the Applicant asked the Secretary-General to review the administrative decision not to grant him the repatriation grant and, in case his reply were in the negative, to grant him permission to submit his appeal directly to the Administrative Tribunal.

On 6 September 1991, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-General had decided to maintain the decision not to pay

him the repatriation grant and had agreed to the direct submission of an appeal against this decision to the Administrative Tribunal.

On 4 December 1991, the Applicant filed with the Tribunal the application referred to earlier.

The Applicant Gourdon, a French national, was elected by the General Assembly and appointed by the Secretary-General as a member of the Joint Inspection Unit (JIU) to serve on a five-year fixed-term appointment, commencing on 1 January 1986 and ending on 31 December 1990. The JIU and its Secretariat are located in Geneva. During his service with the JIU and, at the time of his separation, the Applicant lived in Veigy-Foncenex in the French "zone Franche du Pays de Gex et de la Haute Savoie" adjacent to Geneva.

On 23 November 1990, the Applicant asked the Chief of Personnel of the United Nations Office at Geneva (UNOG) for payment of the repatriation grant, under staff rule 109.5 and Annex IV to the Staff Rules.

In a reply dated 3 December 1990, the Chief of Personnel informed the Applicant that staff rule 109.5 precluded payment of the repatriation grant to staff members who reside in their home country at the time of their separation from service. He further stated that since the Applicant was a French national residing in France, he was excluded by the terms of the rule from the payment of such a benefit. He added: "the concept of 'zone franche' relates exclusively to certain customs regulations but does not confer any international status nor affects in any way the sovereignty of France over its own territory, ..."

On 26 December 1990, the Applicant asked the Secretary-General to review the administrative decision not to grant him the repatriation grant and, in case his reply were in the negative, to grant him permission to submit his appeal directly to the Administrative Tribunal.

On 18 April 1991, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-

General had decided to maintain the decision not to pay him the repatriation grant and agreed to the direct submission of an appeal against this decision to the Administrative Tribunal.

On 12 December 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. According to the literal and logical interpretation of staff rule 109.5, it should only apply to staff members who are residing in their home country while performing official duties there. For example, French citizens, working in Paris for UNESCO.

2. The Rigoulet decision (Judgement No. 408 (1987)) violates the principle of equality and is not in keeping with the practice of other international organizations in Geneva.

3. French staff members are victims of a dual form of discrimination, based on nationality and place of residence.

Whereas the Respondent's principal contentions are:

1. The Tribunal must maintain its recent interpretation of staff rule 109.5(i) as stated in the Rigoulet decision, denying payment of the repatriation grant to staff members residing in their home country at the time of their separation from service.

2. The Applicant cannot claim to have been unaware of the fact that he would lose his entitlement to the repatriation grant as a result of residing in France.

The Tribunal, having deliberated in Geneva on 10 June 1993, in New York from 20 October to 16 November 1993, and in Geneva from 22 June to 21 July 1994, now pronounces the following judgement:

I. The issues presented by the Applicants are identical, and the Tribunal therefore considers the two applications jointly. The Respondent has not raised any issue concerning the Tribunal's jurisdiction in respect of the Applicant Gourdon, a member of the JIU, and has requested that the Tribunal adjudicate his claim.

II. Having reviewed the documentation filed in both these cases as well as the Rigoulet decision (Judgement No. 408 (1987)), the Tribunal considers that the Applicants are entitled to the repatriation grant by virtue of the considerations set forth below.

III. The Respondent's refusal to pay the Applicants the repatriation grant is based on his interpretation of staff rule 109.5 (i). In fact, the Tribunal believes that the outcome of both these cases hinges upon the proper interpretation of staff rule 109.5 (i). This rule reads as follows:

> "No payments shall be made to ... any staff member who is residing at the time of separation in his or her home country while performing official duties. A staff member who, after service at a duty station outside his or her home country, has served at a duty station within that country may be paid on separation, subject to paragraph (d) above, a full or partial repatriation grant at the discretion of the Secretary-General."

The other relevant provisions on the repatriation grant are staff rule 109.5(d) and Annex IV to the Staff Regulations which provide as follows:

> Staff rule 109.5(d)
>
> "Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station."
>
> Annex IV
>
> "In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to a repatriate... Staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station."

IV. An important principle of interpretation is that construction is to be made of the text as a whole, and not of one section alone. That is, the meaning of a section may be affected by other individual sections in the same text. Therefore, staff rule 109.5(i) should be

construed with reference to the context and with reference to other provisions, namely staff rule 109.5(d) and Annex IV. In other words, these provisions should be read together and not in isolation in order to obtain their proper construction. For example, and to illustrate this principle of interpretation, if one section of an Act requires that "notice" be "given", verbal notice would be sufficient. But if another section provides that notice should be "served" on a person, or "left" with him, one could infer that a written notice was intended. (Maxwell on Interpretation of Statutes, 12th Edition, pp. 59-60).

V. Both section 109.5(d) and Annex IV specifically refer to the duty station which the individual must leave in order to be entitled to the repatriation grant. These texts do not make entitlement to the grant subject to any nationality condition. Leaving the country of the "duty station" is the pivotal and determining condition of eligibility. The UN's interpretation of staff rule 109.5(i) which uses the concept of "residence" as the condition for eligibility leads to illogical and unfair results for it does not take into account the other relevant provisions.

VI. The Tribunal considers that the majority opinion of the Tribunal in the Rigoulet case concerning the interpretation of staff rule 109.5(i) should be regarded as concerning a staff member performing official duties in his/her home country. Otherwise, the expression "performing official duties" would be superfluous. An interpretation of a provision which would leave without effect part of the text should be rejected. In addition, as noted by Mr. Roger Pinto in his dissenting opinion "according to a consistent rule of interpretation, the provision to be interpreted must produce a useful effect" (paragraph XIII). The Tribunal considers that Mr. Roger Pinto's opinion should be applied to the present cases.

VII. In the context of the provisions dealing with eligibility for the repatriation grant, it is helpful to refer to the original purpose of this grant. One of the goals of interpretation is to discover the true intention of the original drafters.

VIII. It appears that the repatriation grant was introduced as a result of the Fleming Commission in 1949. It was recognized that when staff members left the United Nations they incurred extra expenditures. How the grant was to be calculated is important for our purposes. It was to be determined by the Consultative Committee on Administrative Questions (CCAQ) which, inter alia, stipulated that one qualifying year with respect to the repatriation grant should be lost for each 6-month period of duty service in the home country (emphasis added). Hence, if one worked in one's home country, one would not qualify for the grant and in fact would lose qualifying time. Consistent with the above, the location of the duty station is the determining factor in calculating the repatriation grant.

IX. As noted in Rigoulet, already in 1969, the Chief of Personnel of the World Meteorological Organization (WMO), responding to a staff organization memorandum on whether French Nationals residing in the French zone were entitled to the repatriation grant, stated:

> "'In the case of ITU, whose Staff Rules are virtually identical to those of the United Nations on this point, home leave is nevertheless granted to French nationals who were recruited outside the local radius, even when they reside in the area adjacent to Geneva'.
>
> In recommending this solution, the Chief of Personnel added:
>
> 'This solution has the advantage of settling the question of payment of the repatriation grant, which according to WMO staff rule 194.1, is payable to staff members having served for a number of years "away from [their] home country" ...'
>
> The home country is defined as:

...the country of home leave entitlement'." (Cf. Rigoulet, dissenting opinion by Mr. Roger Pinto, paragraph VI).

The Chief of Personnel then recommended the adoption of such a position for the WMO, declaring it to be "logical and fair".

X. As further noted in Rigoulet, in 1974, the CCAQ, which was also called upon to make a determination concerning the repatriation grant, discussed this point in a report of 18 December 1974. It stated:

"'14. ...what must be determining is the place of duty and to get into questions of where a staff member actually resides in the Geneva area can only lead to endless paradoxes. For example, it would be totally unrealistic to make a distinction between those who reside in Ferney (within the radius defined as Geneva) and those who reside in Thonon (from which hundreds of French commute daily to Geneva). A practical consideration is the fact that Geneva has virtually no hinterland and increasingly the surrounding French territory will become the bedroom of this city."'
(Cf. Rigoulet, dissenting opinion, paragraph VIII)

The CCAQ therefore concluded that, in authorizing the repatriation grant, the simplest rule was to make determinations based on the duty station, provided that the staff member in question was originally recruited from outside the local area adjacent to Geneva. This situation applies to both the Applicants in this case.

XI. The conclusion that the determining factor was the country of the duty station was affirmed once again by the Chairman of CCAQ during the 38th session of the International Civil Service Commission, when he recalled that the conditions of service of the common system were established, inter alia, on the premise that entitlements were based on the staff duty station. This condition applied not only to repatriation but also to other conditions of employment such as hardship and mobility (paragraph 139, 38th session).

XII. Therefore, the true intention of the United Nations in drafting these staff rules was to provide staff members payment for relocation expenditures; the point of departure was the country of the duty station. Upon moving to Paris, both Applicants incurred relocation expenditures. By denying them the repatriation grant based on its interpretation of staff rule 109.5(i), the Organization is thwarting the object of these rules.

XII. The Respondent claims that his position is justified by the "straightforward application" of staff rule 109.5(i). He suggests that this provision concerns staff members who perform official duties in a country other than their home country, while residing in their home country. However, in the Tribunal's view, such a literal application of a rule is possible only if the rule itself is clear and unambiguous. The language that: "No payments shall be made to ... any staff member ... while performing official duties" must be read as referring to staff members who perform official duties in their home country (emphasis added). On that basis, the grant may be refused, as the staff members both perform official duties and reside in their home country.

XIV. Furthermore, the Respondent's interpretation is inconsistent with the reading of Annex IV to the Staff Regulations which stipulates in part that "staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station."

XV. The Tribunal's view is that relocation and the consequent payment of the repatriation grant are contingent upon the location of the duty station and not the location of the staff member's residence. A person remaining in the country of the duty station is not entitled to the repatriation grant. Therefore, it is logical that staff members who relocate to a country outside the duty station are entitled to the repatriation grant. Both Applicants in question have relocated to Paris, France.

XVI. It is clear that the language of staff rule 109.5(i) could be subject to two interpretations. The Tribunal believes that it should reject the interpretation leading to an unreasonable result and adopt the interpretation leading to a reasonable and just result. (The interpretation that was adopted by Mr. Roger Pinto in his dissenting opinion in the Rigoulet judgement). An intention to produce an unreasonable or unjust result is not to be imputed if another construction is available, leading to a just result. (Maxwell, supra pp. 199, 203, 208).

XVII. This premise appears to have been recognized and adopted by almost all the international organizations based in Geneva whose staff rules contain similar provisions. These international organizations who operate within the ambit of the common system of the United Nations, do in fact pay the repatriation grant to all French staff members serving in Geneva and residing in the adjacent French territory upon their relocation to another part of France. The principle of equality of treatment applies here. Only the United Nations and the GATT apply a different policy and refuse entitlement in these cases.

XVIII. The Tribunal agrees with the Applicants' contention that the UN's and the GATT's policy amounts to discrimination, thereby violating a fundamental principle of equality. The denial of the repatriation grant constitutes a dual discrimination on the basis of nationality and of the place of residence, which in the Tribunal's view is not justified.

XIX. Regarding the principle of stare decisis, the Tribunal is not convinced that it cannot reverse one of its own previous findings. Indeed, there are many jurisdictions in which courts can, and do, reverse their previous decisions. Save for UN and GATT, this decision of the Tribunal is consistent with the policy of most international organizations in Geneva.

XX. The Tribunal therefore concludes that both Applicants are entitled to the repatriation grant and orders the payment of the repatriation grant to both Applicants.

XXI. Indeed, in any review of the relevant rules by the Administration, it might be worthwhile if the Administration were to effect a change reflecting the distance involved in the relocation from one place to another. This kind of consideration deserves greater prominence than whether or not the relocation involves the crossing of a national border.

XXII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant Kremer and the Applicant Gourdon the repatriation grant due under staff rule 109.5 and Annex IV to the Staff Regulations.

(Signatures)

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 21 July 1994

R. Maria VICIEN MILBURN
Executive Secretary

* * * * *

DISSENTING OPINION by MR. SAMAR SEN

With much distaste, but with utter conviction, I differ both on the law and on the facts from the majority decision.

I. Background

(a) The problem which the Tribunal has faced in the two applications brought before it by Messrs Kremer and Gourdon has a long history. There are important, complicated and other geographical reasons for it, but the plain fact is that the organizations in the UN family (which includes all the Specialized Agencies) follow different rules in the matter of awarding the repatriation grant to staff members. The International Civil Service Commission (ICSC) has been expected for the last few years to suggest uniform rules on the subject, but has not yet done so.

(b) An extract from the 1993 Report of the ICSC (A/48/30) is reproduced below:

> "The Commission decided to report to the Assembly that it had examined the practices of the organizations in that regard [and] that:
>
> (a) The practices followed were consistent with the provisions of the staff rules and regulations as adopted by the governing bodies of the organizations concerned;
>
> (b) Harmonization of practice would require the revision of either the Staff Rules and Regulations of either the specialized agencies headquartered at Geneva or of the relevant portions of the United Nations Staff Rules and Regulations;
>
> (c) The choice between harmonizing around current United Nations or specialized agency practices would appear to be a policy choice rather than a technical one;
>
> (d) Should the General Assembly wish the Commission to study the matter further, it could do so on the basis of any decision the Assembly might take as regards (c) above."

The General Assembly took note of this report in 1993, and sent it back to the ICSC for further study. The extract given above was preceded by a paragraph summarizing the discussion in the ICSC. The present judgement chooses to ignore all this, although the ICSC is the organ responsible for harmonization of all regulations and rules affecting staff of the common system.

(c) Similarly, on the plea of interpreting some rules - which indeed have been examined with care and in detail in the past - the judgement seeks to solve the problem in a particular way, before the General Assembly, or even the ICSC, have indicated which way the UN System should move. It is still for the General Assembly to decide whether harmonization is desired, and if so, by what methods uniformity is to be achieved. The present judgement preempts the General Assembly from exercising its option and in reality prescribes how uniformity is to come about. This is hardly justified.

II. Interpretation

(a) In coming to its conclusion, the majority view depends heavily on what it considers to be the correct and proper interpretation of staff rules 109.5(i) and (d), together with Annex IV to the Staff Regulations. I agree that, in interpreting and in construing specific provisions of Staff Rules and Regulations, the Tribunal should not only take into account the actual texts, but all other provisions which might affect their meaning and application. Indeed, this method was followed on the last occasion the Tribunal considered this question. (Cf. Judgement No. 408, Rigoulet (1987.) Its analysis then covered a wider and more comprehensive field. It is also to be noted that under the heading "United Nations common system of salaries, allowances and benefits" published in April 1987, by the ICSC, the following sentence occurs: "The amount of the grant varies with family status and with length of service outside the home country up to the maxima shown in annex XI." And in annex XI, the first column reads, "Years of continuous service away from home country".

(b) The majority judgement attaches considerable importance to the words "while performing official duties" in staff rule 109.5(i). It holds that the inclusion of these words indicates that if a staff member works at Geneva and resides in a border region of France, he or she is essentially in a different situation from a staff member who lives in France and works in France.

In my view, such an interpretation is both strained and stilted. The dictionary and common sense meaning of the words "performing official duties" would apply to such official UN duties wherever they happen to be - in the staff members' home country or anywhere else. The interpretation now given in the judgement would mean in fact, that the "superfluous" words were included only to protect and promote the interests of staff members of French nationality who resided in France and worked at Geneva[1]. It is well known that there are no other instances where staff members live in their own country and work in some other country. The interpretation given now credits the framers of this rule with extraordinary prescience to foresee and provide for such (exceptional) eventualities we are dealing with. A view like this is far-fetched and the interpretation runs counter to interpretatio talis in ambiguis semper fienda est ut evitetur inconveniens et absurdum. Besides, it is against the legislative history of these rules and regulations.

(c) In order to support its interpretation, the judgement refers to the Fleming Commission in 1949, but its references are selective. This Commission, as did subsequent discussions on the subject, establish beyond all doubt that the repatriation grant - the only grant we are concerned with at the moment - is given to

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[1] At Geneva there are 5 Specialized Agencies: ITU (established in 1865), IMO (1873 - then named International Meteorological Organization; WMO came formally into existence in 1950), ILO (1919), WHO (1945) and WIPO (1970). UN organizations at Geneva are: UN European Headquarters at Geneva (UNOG), UNHCR (1951), UNCTAD (1964), UN Institute of Disarmament and Research (UNIDIR, 1980) and GATT has a slightly different legal status and it created, together with UN, International Trade Centre (UNCTAD/GATT). They all belong to the "UN" family.

persons living and working in places outside their country. The justification for such a grant has always been that it is disadvantageous to live away from one's own country and so, such a situation deserves recompense. This also explains why provision exists that where a staff member serves from time to time both in his or her own country and also in some other country, the staff member becomes entitled to some grant, at the discretion of the Administration, to cover "moving house" and other expenses involved in a transfer from one country to another. Obviously the amount of the grant will depend on a number of factors.

(d) The issue is befuddled with reference to the Consultative Committee on Administrative and Budgetary Questions (CCAQ), and the practice of some specialized agencies, such as WMO, ITU and some other organizations. The CCAQ is without any legislative authority and whatever actions it may recommend must fit in with the legislative requirements of each constituent organization represented in the CCAQ.

Indeed, the minutes of the CCAQ show that at least one of the participants stated that "Geneva is a foyer of France". If this view were to prevail, the Applicants would indeed be considered as working in France, but the implication and intention behind the statement were very different: those who live in French border areas could be treated as living at Geneva! Similarly, the catchment area for recruitment adopted by some Geneva organizations has no relevance to the question of the repatriation grant.

The introduction of these matters can only divert and confuse.

Nonetheless the judgement cites, from time to time, CCAQ deliberation with approval, but omits to mention that what the Chairman of CCAQ said was identical with what the ICSC reported to the General Assembly (Cf. Section I(a) of this dissent). This is followed by further views of the CCAQ as also of the UN representative. None of the questions raised by these organizations have figured in the judgement. In this context, we have to bear in mind that Specialized Agencies like WMO, ITU and some others, by

definition, follow a different practice from that of the UN and that comparison with them is hardly applicable in interpreting UN Staff Rules and Regulations regarding the repatriation grant. If the UN wished to emulate their example, it could easily have introduced the relevant parts of their staff rules regarding the repatriation grant. It did not do so, although it was fully aware of the Rigoulet decision.

(e) Staff rules 109.5 (d), (i) and Annex IV to the Staff Regulations are unrelated to any consideration of nationality, but the judgement says that the UNOG's interpretation of rule 109.5(i) which uses the concept of "residence" as the condition for eligibility leads to "illogical and unfair conclusion for it does not take into account the other relevant provisions". Such a statement remains unexplained and invalid: it is the judgement's failure to take all the relevant factors into account that has led it to a truncated and predetermined interpretation.

For instance, the concept of relocation has been introduced in the judgement, but not developed. Had it been examined fully, it would have been clear that: (a) where a person lives is decisive for the award of the repatriation grant, (b) the present interpretation taken together with the theory behind relocation (I emphasize the prefix re) would produce many strange anomalies. For instance, the Applicants would be entitled to the repatriation grant without having to move even an inch from the hamlets (Prevessin-Moens and Veigy-Foncenex) in which they were living, while another French staff member working in Paris with UNESCO would be denied such a grant, even if he or she were obliged to move out of Paris after retirement and to settle in some distant place in France, after perhaps incurring much expense in the process. Such examples could be multiplied.

(f) Yet, the judgement says in paragraph IX that upon "moving to Paris both Applicants incurred relocation expenditures". This is both misleading and erroneous: under the interpretation given, the Applicants would have been entitled to the repatriation grant even if they had continued to live where they were. There

"relocation" and expenditure had nothing to do with this grant. But once again, paragraph XIV concludes that "both the Applicants in question have moved to Paris." This implies that their move to Paris has something to do with their entitlement to the repatriation grant: in fact it is irrelevant.

III. Discrimination

(a) Discrimination could be established if any organization, in applying its Staff Regulations and Rules, treated different staff members in different ways. There is nothing, absolutely nothing, to show that the UN applied its regulations and rules for repatriation in this manner, and to speak of discrimination in this context is therefore irrelevant and misleading.

(b) What has happened is that the Applicants have compared their conditions with what they could have enjoyed if they had worked in some other organizations. Such comparison is not permissible, because each staff member is governed by the Regulations and Rules applicable to him or her and which he or she accepted in full knowledge and consciousness. To compare one set of service conditions with another and then to conclude that for a particular individual, some rules somewhere would have been more beneficial is reductio ad absurdum.

(c) However, since so much has been said about discrimination, it should be pointed out that French citizens, who are entitled to live in French border areas as a matter of right, enjoy many many advantages which are not available to others: they live in their own country, among their own people, friends and family; their children go to national schools; the cost of living in these areas is lower compared to Geneva's and there are many other facilities. So, all the reasons for awarding the repatriation grant - i.e. the disadvantages attendent on someone working away from one's own country - disappear. In fact, the discrimination is in favour of, and not against, the French citizens living in the border areas of France and working in Geneva. There are some non-French staff members who are also allowed by the French authorities to live

in the border areas and work at Geneva. As a rule, these selected few non-French people enjoy more privileges and amenities than their compatriots or colleagues living at Geneva, but they are not as well-favoured as the fortunate French. No one should begrudge the good luck, in varying degrees, of staff members so favourably placed; however, it is entirely a different matter if the repatriation grant were to be extended to a selected few in the United Nations system, while the rest of the UN staff could claim it only if they worked away from their home country.

The UN Office at Geneva reports that out of its 65 professional and higher category staff, 59 live in France! Discrimination "should be made of sterner stuff."

IV. Revision of a previous opinion

It is tautology and needs no stare decisis to assert that the Tribunal can revise its own opinion, but in order to do so, there must be some new facts or new considerations, otherwise such a reversal becomes capricious. The Rigoulet case was decided only a few years ago and now, to revise it only on the ground that persons who decided Rigoulet are different from those deciding the present case, would not, in my view, be proper and can indeed expose the Tribunal to avoidable criticism. For instance, if another set of cases comes with the same or similar pleas before the Tribunal in the near future and a different interpretation is given by a new panel, the result can lead to chaos and confusion, and even ridiculous consequences. The Tribunal should certainly have the courage to change its earlier views, but such a change must be based on new facts or new considerations, or because a long passage of time had made earlier decisions otiose or because some obvious mistakes had been made. None of these justifications exist in this case. The judgement is grounded on ipse dixit.

V. Broad considerations

The Administrative Tribunal's mandate is based on a decision of the General Assembly and the Tribunal's decisions are to be governed entirely by its Statute.

The ICSC has been specifically authorized to study, and is at present seized of the problem of the vexed "policy" question underlying the conflicting practices followed by the organizations in the UN family in awarding the repatriation grant. In view of all that is implied in the consideration of these cases, it would have been legally more defensible, in my view, to hold the line and maintain the status quo until some indication of the wishes of the General Assembly were made known, specifically, whether harmonization was desirable and feasible and if so, in what direction action should be taken by different units of the UN system. The best that can be said of this judgement is that it might prompt and provoke the ICSC and eventually the General Assembly to take speedy actions. But, that is not the job of the Administrative Tribunal.

(Signatures)

Samar SEN
President

Geneva, 21 July 1994

R.Maria VICIEN MILBURN
Executive Secretary